A

KII SIE HOONG

v.

PP

B

HIGH COURT SABAH & SARAWAK, SIBU
SANGAU GUNTING J
[CRIMINAL APPEAL NO: 42-01-2005]
24 SEPTEMBER 2007

C ***CRIMINAL PROCEDURE:*** *Forfeiture - Dangerous drugs - Forfeiture of property under s. 25 Dangerous Drugs (Forfeiture of Property) Act 1988 - Presumption of illegal property - Whether rebutted - Dangerous Drugs (Forfeiture of Property) Act 1988, s. 35*

D The appellant was, on 29 June 2003, arrested and thereafter detained under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. Later on the same day, the following property – one Toyota Land Cruiser ('TLC'), one Mazda GTS ('Mazda'), cash totalling RM1,200 ('said cash'), one Nokia 7250 E hand phone ('said hand phone'), one bank account book and four ATM cards – was seized under s. 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('Act'). The appellant claimed ownership of the property, resulting in a reference of the appellant's claim to the sessions court judge. After hearing the F evidence of the appellant and the submissions of both parties, the judge, in a deferred ruling, ordered forfeiture of all the seized property with the exception of the bank account book and the four ATM cards. This was the appellant's appeal against that ruling. What required determination in the instant case was G whether the appellant had successfully established that no offence had been committed under the Act or under the Dangerous Drugs Act 1952 concerning the property, that such property was not illegal property and that he was lawfully entitled to the property. Failure by the appellant to fulfil the burden of proof *ie*, on a H balance of probabilities, would render the property liable to forfeiture. The case against the appellant stated that the appellant was a trafficker in dangerous drugs from August 1999 to February 2000 and from early September to December 2002. The appellant alleged that the respective purchases of the TLC and the Mazda I were concluded and fully paid for well outside this alleged period of trafficking, which meant that the presumption of illegal property pertaining to the two vehicles under s. 35 of the Act had,

therefore, been rebutted. As regards the said cash and said hand phone, the appellant averred that Forms J pertaining to his income tax and his oral evidence were sufficient to rebut the same presumption under s. 35 of the Act.

Held (dismissing the appeal, except for the order regarding the Mazda):

(1) In the circumstances of this case, the question of whether or not the TLC had been fully paid for on 26 January 1999 remained open. This situation in turn made it necessary on the appellant's part to adduce the appropriate evidence to prove when the TLC was fully paid for by him, and/or to clear any lingering doubt pertaining to the said issue. Otherwise, it would still be open for the court to infer that in all probability payment at any rate towards the completion of the purchase of the TLC was still ongoing from 26 January 1999 onwards. Due to the scanty evidence adduced, it seemed impossible to ascertain whether or not even up to the day of hearing at the sessions court, the full purchase price of the TLC had been fully settled. Therefore, although ownership would appear attributable to the appellant by virtue of the endorsement on 26 January 1999 of the appellant's name on the registration card, it could not be concluded for sure that the purchase price had been fully settled by that date or by any particular date prior to August 1999. Thus, in line with the burden upon the appellant to rebut the presumption under s. 35 of the Act, particularly that the TLC was "illegal property", the evidence could not, on a balance of probabilities, show that the ownership had actually passed to the appellant on 26 January 1999. The evidence adduced justified the inference that, in all probability, money derived from the appellant's trafficking of dangerous drugs from August 1999 onwards could very well have been used towards the part or full payment of the purported purchase price of the TLC. Thus, it could not be concluded that the presumption under s. 35 of the Act had been sufficiently rebutted. (paras 36 & 37)

(2) Concerning the Mazda, since the respondent appeared to have conceded that ownership had passed to the appellant in 1997 and that the appellant was trafficking in dangerous drugs only from August 1999 to February 2000 and since early September until December 2002, it would appear justified to conclude that the appellant had, on a balance of probabilities,

satisfied the burden of proof placed upon him to show that the Mazda was not "illegal property". The burden then shifted to the respondent to prove clearly and conclusively that the Mazda must still be considered as "illegal property". On the facts, the respondent's attempts to raise doubts in the appellant's case were insufficient. There was no challenge by the respondent as to the ownership claim by one Public Finance Bhd ('PFB') having been endorsed on the Mazda registration card. There was also no challenge as to the appellant's having presumably paid the final instalment in May 1997, nor was there any dispute as to the deletion presumably by the Road Transport Department of the said ownership endorsement by the PFB. Such evidence lent credence to the appellant's evidence that he had obtained a loan from PFB to partly finance the purchase of the Mazda, and that such a loan was finally settled in May 1997. (paras 41, 42 & 43)

(3) In respect of the said cash and the said hand phone, the lack of documentary evidence to show the appellant's income from his alleged sources, the seemingly obvious non-disclosure of such income in the Forms J tendered in court and the high probability of him making false declarations though the said Forms J made the submission that the appellant had failed to rebut the presumption of "liable person" under s. 35 of the Act tenable. More specifically, the appellant had failed to prove that the said cash and the said hand phone were not illegal property. The very poor quality of the evidence adduced juxtaposed with the appellant's own testimony of having been involved in selling dangerous drugs since 2001 made it impossible to ascertain, on a balance of probabilities, the issue of whether the property was wholly or partly derived or obtained from or by means of any prohibited activity of the appellant. (para 51)

Case(s) referred to:

Ho Ming Siang v. PP [1966] 1 MLJ 252 ***(refd)***
PP v. Lee Kee Seng & Anor [2005] 3 CLJ 649 HC ***(refd)***
PP v. Tan Lee Kok [1998] 2 CLJ 286 CA ***(refd)***
Public Finance Bhd v. PP [1999] 8 CLJ 485 HC ***(refd)***

Legislation referred to:

Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 2, 7(1)(a)(ii), 24(5), 25(1), (2), 32(2), (3), 34, 35
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 9

For the appellant - Orlando SW Chua; M/s Wong, Orlando Chua & Kuok
For the respondent - Budiman Lutfi Mohamed DPP; A-G's Chambers

Reported by Suresh Nathan

JUDGMENT

Sangau Gunting J:

Background Facts

[1] The Minister concerned having been, *inter alia*, satisfied with respect to Kii Sie Hoong (appellant) that he "has been or is associated with any activity relating to or involving the trafficking in dangerous drugs," the appellant was on 29 June 2003 arrested and thereafter detained under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. Later on the same day (29 June 2003), the following properties were seized under s. 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ("the Act"): one Toyota Land Cruiser (QKS 3133), ONE Mazda GTS (QSF 8285), cash totaling RM1,200, one NOKIA 7250 hand phone, one bank account book and four ATM cards.

[2] In response to a notice (Borang 17) issued under s. 25(2) of the Act, the appellant through his advocates wrote a letter dated 28 July 2003 claiming ownership of all the afore-mentioned properties. Hence, the Deputy Public Prosecutor's reference of the appellant's claim (Sessions Court Case No. 64-03-2004) to the Sessions Court Judge under s. 32(3) of the same Act. After hearing evidence of the claimant/appellant and the submissions of both parties, in a deferred ruling the Sessions Court Judge ordered forfeiture of all the seized properties, except the bank account book and the four ATM cards. Dissatisfied, the appellant lodged a notice of appeal against the said ruling.

[3] Except for the last two items, concerning which at the commencement of the Sessions Court hearing both parties to the claim agreed to disregard, all the properties mentioned in para. 1 above form the subject matter of the appellant's claim in the instant case.

[4] Section 25(1) of the Act contemplates of "Any movable property which a senior police officer reasonably suspects to be the subject matter of an offence under this Act, or which has been used for the commission of that offence, or illegal property ..." The order of forfeiture made by the learned Sessions Judge would appear to be essentially based on her findings as follows:

a) That the appellant/claimant "was involved in trafficking of dangerous drugs ie selling ecstasy pills ...";

b) "(T)hat money earned from dangerous drugs trafficking were also partly used to purchase the properties in question;" and

c) That "the claimant has failed to rebut on balance of probabilities the legal presumption of liable person and illegal property under s. 35 of the Dangerous Drugs (Forfeiture of Property) Act 1988.

[5] In his petition of appeal, the appellant lists nine grounds why he is dissatisfied with the forfeiture order. All nine grounds "might be dealt with together as they are all concerned whether or not the learned Sessions Court Judge has applied the correct test in ordering the forfeiture in the circumstances of the case." (emphasis added). This was said by learned counsel for the appellant in his oral submission at the hearing of the appeal. In his submission the appellant's counsel referred to, *inter alia*, 3 sheets of documents collectively marked as encl. 1. This document seems to have been issued pursuant to ss. 6(1) and 9 of the Dangerous Drugs (Special Preventive Measures) Act 1985 (as amended by A629, A707, A738 and A766 as well as under the Kaedah-Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) Prosedur Lembaga Penasihat 1987. It was conceded by the learned Deputy Public Prosecutor (DPP), that the said documents ought to have been but was not included in the record of appeal.

[6] The appellant's counsel focuses on the 1st paragraph of the portion of encl. 1 entitled: "ALASAN-ALASAN YANG ATASNYA PERINTAH ITU DIBUAT": "Bahawa kamu (Kii Sie Hoong) adalah seorang pengedar Pil Ecstacy yang mengandungi dadah berbahaya jenis 3, 4 Methylenedioxy Methamphetamine di kawasan Pusat Hiburan The Master Club, Jalan Lanang, Sibu, Sarawak sejak Ogos 1999 hingga Februari 2000 dan dari awal September 2001 hingga Disember 2002." The underlined portion was emphasized by counsel.

[7] One of the grounds of appeal alleges failure on the part of the Sessions judge "to direct her mind that given the alleged periods of time when the appellant was alleged to be involved in drug-related activities she ought to have concluded that the respective purchases of the Toyota Land Cruiser (QKS 3133) and the Mazda Familia GTX (QSF 8285) were concluded and fully paid for well outside the said alleged periods." (emphasis added).

[8] Sections 32(3) and 35 of Dangerous Drugs (Forfeiture of Property) Act 1988 respectively states:

Section 32(3):

The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the Court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that *no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released* to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited. (emphasis added).

Section 2(a):

"illegal property" means any property, whether within or outside Malaysia:

(a) which is *wholly or partly* derived or obtained from or by means of any prohibited activity carried out by any person after the commencement of this Act; (emphasis added)

Section 35:

Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, *the Court shall presume that person to be a liable person and that property to be illegal property,* unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same. (emphasis added)

These are among the main provisions which would have to be considered in determining whether the learned Sessions judge was correct in making the forfeiture order.

The Appeal

[9] The appellant's counsel refers to the appellant's testimony at pp. 20, 21 and 22 of the record of appeal. The quoted portion of p. 20 essentially states that the appellant had never been charged for any drug offence, either under the Dangerous Drugs (Special Preventive Measures) Act 1985, and that neither the Toyota Land Cruiser QKS 3133 nor the Mazda QSF 8285 was involved in any offence related to drug. On pp. 21 and 22 of the record of appeal the appellant states: "I bought the Toyota Land Cruiser QKS 3133 on 26 January 1999. I paid RM80,000 for the said Land Cruiser. I did not obtain any loan to buy the land cruiser. I paid the RM80,000,00 in cash. On 5 July 2002, the vehicle was registered in the name of Master Club (2001). I sold it to Master Club. I registered the Land Cruiser to Master Club (2001) in order to pay less road tax by amount of RM2,150. I have not been paid for the sale of the Land Cruiser even until now. By 5 July 2002, I was still a major shareholder of Master Club; holding 50% shares. There was no documentation on the sale. I have not been paid that is why I am claiming for the Land Cruiser. Master Club ceased business after December 2003. My partner was not able to contact me about the Land Cruiser as I was under detention then. The RM80,000 was saving from all sources of income from car dealing, snooker centre and Master Club. I paid cash as I did not want to pay interest. Non (summons in chambers) of the said RM80,000 came from sale of drugs or illegal drug activities."

[10] Focusing on the Toyota Land Cruiser; the appellant's counsel refers to the relevant registration card. Based on the registration card counsel contend that (a) the said vehicle was not under any hire-purchase agreement, (b) the appellant's name was entered in the registration card on 26 January 1999, and (c) the Master Club's particulars were entered in the registration card on 5 July 2002.

[11] Concerning the Mazda QSF 8285 GTS No. QSF 8285 the appellant testified: "on 22 May 1995, I bought a car Mazda GTS No. QSF 8285. It was bought through hire purchase, with MBF Finance Sibu for a sum of RM15,000. The Hire-Purchase

Agreements was for two (2) years installment of RM400 PLUS A MONTH FINAL PAYMENT WAS MADE IN May 1997." Having quoted the afore-mentioned portion, the appellant's counsel then referred to the relevant registration card which shows (a) "HAKMILIK DITUNTUT OLEH MBF FINANCE BHD" having been endorsed therein, and (b) the date the appellant's name having been endorsed on 22 May 1995.

[12] As regards the cash of RM1,220, the appellant's counsel quoted yet another portion of the appellant's evidence: "The cash of RM1,220. When I was arrested on 29 June 2003, I was working. I was making some money. The RM1,220 was from my salary from Master Club. It has nothing to do with drug." Learned counsel submitted that presumably based on both oral and documentary evidence, "... it is ... crystal clear that at the time when the respective ownership of the 2 vehicles passed to the appellant, there was no complaint whatsoever that he was then engaged in drug related activities ... the documentary evidence so produced would therefore lend credence to the appellant's oral testimony that he was able to purchase those two vehicles through his savings and income generated by the various jobs that he had undertaken at the material time." According to the appellant's counsel, the Appellant's Income Tax Act 1967 Forms J for the assessment years 1998, 1999, 2000, 2001, 2002, 2003 and 2005 (all tendered and marked as exhibits) "support the appellant's contention."

[13] Having read out Grounds A1 to A8 of the petition of appeal, learned counsel contended that "the lower court has completely misdirected itself based on the 8 grounds read out earlier." Thereafter counsel refers to various portions of the ruling by the learned Sessions judge as follows:

> As regards the Toyota Land Cruiser, the claimant testified he bought it in 1999 for RM80,000.00 in cash. He said he bought it using money from his personal savings. It must be noted that no documentary evidence was adduced on the alleged savings.
>
> Claimant further testified the Land Cruiser was then sold to Master Club (2001) for RM80,000.00 in year 2002. However, Master Club did not make any payment. Again no documentary proof of the alleged Sale and Purchase transaction.
>
> As regards the Mazda GTS No. QSF 8285 the claimant bought it on hire purchase in 1995. No evidence was adduced to show the source of the money to purchase the Mazda.

Sale of Sarikei Land

The claimant adduced evidence the (Summons In Chambers) he sold 1/18th undivided share in land in 1993 for RM25,000.00. Again no evidence adduced as to where the money was kept and whether that money was used to purchase any of the vehicles in question.

Income Tax J Forms

The claimant tendered Income Tax J Forms to show his incomes. However, the amounts stated therein are in contradiction to the amount of earnings that he testified in Court. Therefore I reject claimant (Summons In Chambers) testimony as unreliable.

Having duly considered the evidence of claimant especially the fact that the claimant was actually involved in trafficking of dangerous drugs ie selling ecstasy pills from which he earned about RM1,000.00 per month, **it is my finding of fact that money earned from dangerous drugs trafficking were also partly used to purchase the properties in question.** Thus I find that the claimant has failed to rebut on balance of probabilities the legal presumption of liable person and illegal property under Section 35 of the Act.

[14] Learned counsel then refers to the following portions of the appellant's evidence:

Q: When did you start taking ecstasy?

A: 1996.

Q: When did you start selling ecstasy?

A: 2001.

Making a cross reference to encl. 1 p. 3, 1st paragraph counsel contends, "... surely the answer to 'When did you start selling ecstasy?' the appellant must have meant early September 2001." In this connection, counsel says, "It is the golden rule of construction of penal law in that any act as in legislation imposing criminal or other penalties should be clear and unambiguous and should be construed narrowly in favour of the person proceeded against".

[15] The appellant's counsel further submits "the respective ownership on the two vehicles had passed to the appellant and remained with the appellant well before his alleged drug-related activities". (emphasis added). Counsel specifically refers to the

period of time stated under para. 1 of the portion of encl. 1 entitled "PENGATAAN-PENGATAAN FAKTA YANG ATASNYA PERINTAH ITU DIASASKAN" ie "... sejak Ogos 1999 hingga Februari 2000 dan dari awal September 2001 hingga Disember 2002." Counsel invites the court "to scrutinize the two registration cards tendered at the lower court ..."

[16] Presumably relevant to "the periods which the appellant was alleged to be involved in drug related activities *vis-a-vis* the entries in the two registration cards of the vehicles", counsel cited *Ho Ming Siang v. Public Prosecutor* [1966] 1 MLJ 252 (per Thompson, LP):

> With regard to the first of these charges, the dates are wrong and the charge was at no time amended but, as was pointed out in *Law Kiat Kiang v. Public Prosecutor* [1996] 1 MLJ 215 FC this is without importance. As was said by Atkin J in the case of *Severo Dossi* [1918] 13 Cr. App. R.158, 159:
>
> > From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

[17] Learned counsel contends "the presumption of illegal property pertaining to the two vehicles under s. 35 of the Act had therefore been rebutted." As regards the cash of RM1,220 and the Nokia hand phone, counsel says "the Form J and the oral evidence of the applicant are sufficient to rebut the same presumption of illegal property under s. 35 of the Act. At all material times the appellant was earning and he was paying taxes." (emphasis added).

Submission Of The Respondent

[18] The learned Deputy Public Prosecutor contends "the crux of the instant appeal lies in the application of s. 32 and 35 of Dangerous Drugs (Forfeiture of Property) Act 1988." It was also raised at the outset the fact that the applicant was arrested on 29 June 2003 and later detained under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. It seems undisputed that it was after the arrest that the afore-mentioned properties were seized under s. 25 of the Act.

[19] The learned Deputy Public Prosecutor contends s. 32 of Dangerous Drugs (Forfeiture of Property) Act 1988, "places the burden on the appellant to show such properties and that it

A is not liable to forfeiture." In support, the learned Deputy Public Prosecutor cited *PP v. Tan Lee Kok* [1998] 2 CLJ 286 (CA). This submission seems to have been conceded by the learned counsel for the appellant.

B **[20]** Citing s. 35 of the Act, the learned Deputy Public Prosecutor says "in any proceeding brought under this Act, the Sessions Court to which a claim is referred under s. 32(2) of the Act, shall at the outset of the proceeding presume that the appellant is a liable person and that the seized property is illegal C property." In this connection, the case of *PP v. Lee Kee Seng & Anor* [2005] 3 CLJ 649 (High Court) was cited. This contention also appears to have been conceded by the appellant's counsel.

[21] With respect, I would agree with what appears to be the D learned Deputy Public Prosecutor's summarized formulation of what the court must determine in the instant case as well as in similar cases: Whether the appellant has successfully established (i) that concerning the property no offence has been committed under the Act or under the Dangerous Drugs Act 1952, (ii) that such property is not illegal property, and (iii) that the appellant is E lawfully entitled to the property. Failure on the appellant's part to fulfill the burden of proof ie on a balance of probabilities concerning the afore-mentioned matters would render the property liable to forfeiture.

F **[22]** Learned counsel for the appellant in his final written reply focuses on (a) the Preamble to the Act, (b) the fact of the appellant being a "liable person" under s. 7(1)(a)(ii) of the said Act, (c) the definition of 'illegal property' under s. 2 thereof, (d) the "periods ... in which the appellant was purportedly engaged in G drug-related activities" presumably as per p. 3 of encl. 1 "sejak Ogos 1999 hingga Februari 2000 dan dari awal September 2001 hingga Disember 2002", and (e) the status of the two seized vehicles as at the time of the seizure, presumably considered in the context of *Public Finance Bhd v. PP* [1999] 9 CLJ 485 (High H Court). According to counsel, the presumption as provided in s. 35 of the Act "has been successfully rebutted by the appellant ..."

[23] The description under s. 7(1)(a)(ii) seems to be confined to I persons liable to be proceeded against under Part III of the Act. But it could hardly be argued that the appellant fits the definition. Anyway, the Deputy Public Prosecutor's decision to be merely a

'forwarding agent' (see *Public Prosecutor v. Tan Lee Lok* [1998] 2 CLJ 286 should not be allowed to impede the appellant's wanting to highlight portion or portions of the contents of encl. 1 which he considers helpful to his claim. As to the Preamble the relevant part states, "An Act to make provisions ... for the seizure and forfeiture of property, connected with activity related to offences under this Act, the Dangerous Drugs Act 1952 ... and for matters connected with the afore-mentioned provisions."

[24] It is to be recalled briefly the substance of the presumption under s. 35 of the Act: "Where any proceedings under this Act are brought ... in respect of any property on the ground that such person is a liable person or that such property is illegal property, the court shall presume that person to a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence ..." (emphasis added). Now, based on encl. 1 "Pengataan-pengataan Fakta Yang Atasnya Perintah Itu Diasaskan" (Sheet No. 3 of encl. 1) it does appear to be the Deputy Home Minister's case, that the appellant was a trafficker in dangerous drugs since August 1999 until February 2000 and from early September 2001 until December 2002.

[25] The respondent contends that regardless of whether the relevant purchases were made "prior to, during or after the alleged period of drug trafficking ... once a claim for the properties is referred to the Sessions Court for determination under s. 32 of the Act, then as per the decision of the High Court in *Lee Kee Seng* and the Court of Appeal as in *Tan Lee Lok* (both reported in [2005] 3 CLJ 649 and [1998] 2 MLJ 65 respectively) the law places the burden on the claimant or the appellant in the instant appeal to answer the summons to rebut on a balance of probabilities the presumption of liable persons and illegal property under s. 35 of the Act."

[26] It must be pointed out as rather blurry the issue of whether "the presumption of liable persons" is applicable or otherwise to a proceeding under s. 32 of Part IV in view of the definition of a "liable person" being confined to proceedings under Part III only. But that would perhaps be delving into "ambiguities ... infirmities of language ... other defects or deficiencies ..." in the provisions of the Act, which by virtue of s. 34 of the same Act should be disregarded so that any construction and interpretation thereof would "give effect to the purposes of this Act ..."

A **Focus On The Appellant's Evidence**

The Vehicle Toyota Land Cruiser QKS 3133

[27] The Registration Card for the Toyota Land Cruiser QKS 3133 shows that the said vehicle was registered in the appellant's name on 26 January 1999, and that the ownership was presumably transferred to the Master Club on 5 July 2002. The appellant testified he bought by cash of RM80,000 the said vehicle on 26 January 1999. Going strictly by the Deputy Home Minister's case against the appellant, that the appellant was a trafficker in dangerous drugs since August 1999, and assuming as truthful the appellant's evidence that he bought the vehicle on 26 January 1999, then how could it be said that the said vehicle is 'illegal property' as defined by s. 2 of the Act?

[28] It would appear that under s. 35 of Dangerous Drugs (Forfeiture of Property) Act 1988 the presumption must be invoked, "Where any proceedings under this Act are brought ... in respect of any property on the ground that such person is a liable person or that such property is illegal property ..." And it seems "proceedings under this Act" would include the learned Deputy Public Prosecutor's reference of the appellant's claim (Sessions Court Case No: 64-03-2004) to the Sessions Court Judge under s. 32(3) of the same Act. And under s. 32(3) of the same Act "the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released ..." (emphasis added). The court therefore must be satisfied not only that "no offence ... has been committed in respect of the property ..." but also that "such property is not illegal property ..."

[29] The details of the 'laporan lengkap penyiasatan' and the 'laporan Pegawai Siasatan' would have been made known to the Timbalan Menteri Dalam Negeri before signing the said "Perintah Tahanan," which, together with, *inter alia*, the "Pengataan-pengataan Fakta Yang Atasnya Perintah Itu Diasaskan" was presumably handed to the appellant through a police officer on 9 February 2004. That was more than seven (7) months after the appellant's arrest on 29 June 2003. Now, if investigation under that section and under s. 6 of the Dangerous Drugs (Special

Preventive Measures) Act 1985 were commenced and pursued simultaneously as perhaps they should have been, then in all probability there would be consistency in the consequential action or actions taken against the appellant ie both under s. 6 of Dangerous Drugs (Special Preventive Measures) Act 1985 and s. 24(5) of the Dangerous Drugs (Forfeiture of Property) Act 1988.

[30] Anyway, the Honourable Deputy Home Minister must be taken to have based his reason or reasons for issuing the relevant restriction order under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 upon having been briefed concerning the result of prior investigations pertaining to the activities of the appellant. The appellant was undisputedly detained, but as per encl. 1 the grounds for detention relate to the aforementioned "Pengataan-pengataan Fakta Yang Atasnya Perintah Itu Diasaskan". So if the appellant started trafficking in dangerous drugs only in August 1999, how could it be inferred that the money or part thereof used by him to buy the vehicle Toyota Land Cruiser QKS 3133 was money derived from the sale of dangerous drugs? At first blush, these implicit arguments seem attractive.

[31] Notwithstanding the afore-mentioned implicit arguments, there remains the fact that the appellant did not provide any proof of his savings in 1999 presumably to support his evidence of having bought the said vehicle by cash in the sum of RM80,000 on or before 26 January 1999. Also raised was the fact that no sale and purchase agreement was produced in support of the appellant's testimony, that the said vehicle was sometime in 2002 sold to the Master Club for RM80,000. It seems pertinent at this juncture to recall what is stated under the "Pengataan-pengataan Fakta Yang Atasnya Perintah Itu Diasaskan": *inter alia*, that the appellant was trafficking in dangerous drugs since August 1999 to February 2000, and since early September 2001 until December 2002. In the circumstances, could the purported acquisition of ownership of the said vehicle have been procured with at least partly by income derived from his dangerous drug trafficking activities, notwithstanding the implication by the "Pengataan-pengataan Fakta Yang Atasnya Perintah Itu Diasaskan" that the appellant started trafficking in dangerous drugs only in August 1999?

[32] In this connection, it would appear vital to establish that the appellant had indeed fully paid for the said vehicle prior to or on the day (26 January 1999) the endorsement of purported ownership was made on the Registration Card. As to the purported sale of the said vehicle Toyota Land Cruiser QKS 3133, to begin with – assuming a sale presumably in 2002 actually occurred – it seems rather curious why the purported sale price remained the same ie RM80,000 despite of the lapse of about three years since the appellant presumably first bought it in January 1999. Anyway, there is also the fact that no sale and purchase agreement between the parties to the purported sale was tendered in support. And it may be noted, that – other than the appellant's oral evidence in court that he had paid in cash of RM80,000 for the vehicle – at any particular point in time – there seems to be no clear and conclusive evidence of the appellant having wholly or partly paid for the said vehicle.

[33] There is another question that needs to be asked: must the endorsement of the appellant's name on the relevant Registration Card be taken as proof that by the date of the said endorsement (26 January 1999) the said vehicle must: necessarily have been completely paid for, so as to show that ownership had actually passed to the appellant? If so, and keeping in mind the burden on the appellant to rebut the presumption under s. 35 of the Act – the existence and applicability of which seem to have been in any case conceded by the appellant's counsel – why was there no evidence documentary or otherwise adduced other than the appellant's own testimony?

[34] For example, there would appear to be no receipt issued in respect of the purported payment of the RM80,000. This does seem contrary to the demand of plain logic or common sense – that usually one would be reluctant to part with a substantial sum of cash such as RM80,000 without a receipt issued in respect thereof by the recipient. In fact other than the relevant Registration Card, there was no other documentary evidence adduced concerning the purported purchase transaction relating to the vehicle Toyota Land Cruiser QKS 3133. In this respect, the burden placed upon the appellant by s. 35 of the Act has not been sufficiently discharged.

[35] Anyway, the endorsement of the appellant's name on the Registration Card by itself, in the circumstances of this case, cannot be taken as proof that the said vehicle had, by the date of the endorsement, been fully paid for. The appellant's own evidence seems to support this view. The Master Club for instance has been on 5 July 2002 endorsed on the Registration Card as the next 'owner' of QKS3133. But the appellant's own evidence indicates that even as at the date of his testifying in court on 29 July 2004, ie about two years after the endorsement of the Master Club's name on the Registration Card, the appellant was yet to be paid for the sale to the Master Club of the said vehicle. So it would appear endorsement on the Registration Card of the name of the purported 'owner' could somehow be effected regardless of whether or not the vehicle in question has been completely or even partly paid for.

[36] In the circumstances, it remains open the question of whether or not the vehicle Toyota Land Cruiser QKS 3133 had been fully paid for on 26 January 1999. This situation in turn makes it necessary on the part of the appellant/claimant to adduce the appropriate evidence to prove when the said vehicle was fully paid for by him, and/or to clear any lingering doubt pertaining to the said issue. Otherwise, it would still be open for the court to infer that in all probability payment at any rate towards the completion of the purchase of the said vehicle was still ongoing from 26 January 1999 onwards. Due to the scanty evidence adduced actually it seems impossible to ascertain whether or not even up to the day of the hearing at the Sessions Court the full purchase price of the said vehicle has ever been fully settled.

[37] Therefore, although by virtue of the endorsement on 26 January 1999 of the appellant's name on the Registration Card, the ownership would appear attributable to the appellant, it could not be concluded for sure that the purchase price has been fully settled by that date or by any particular date prior to August 1999. Thus in line with the burden upon the appellant to rebut the s. 35 presumption particularly that the said vehicle is "illegal property", the evidence could not on balance of probabilities show that ownership had actually on 26 January 1999 passed to the appellant. The scantiness of the evidence adduced invites and justifies the inference that in all probability money derived from the appellant's trafficking of dangerous drugs from August 1999 onwards could very well have been used towards the part or full

payment of the purported purchase price of the said vehicle. In the circumstances, with respect, it could not be concluded that the presumption under s. 35 of the Act has been sufficiently rebutted.

The Car Mazda GTS QSF 8285

[38] Concerning the Mazda GTS QSF 8285 it seems undisputed by learned counsel for the appellant, that the s. 35 presumption also applies, and therefore the burden lies on the appellant to rebut it. The presumption applies because of the requirement to show that it is not 'illegal property' as defined under s. 2 of the Dangerous Drugs (Forfeiture of Property) Act 1988 – particularly s. 2(g) thereof. The appellant testified he bought it by entering into a two-year Hire-Purchase Agreement with Public Finance Berhad (PFB) in the sum of RM15,000. That was presumably after paying a deposit of RM20,000. PFB'S ownership claim is actually endorsed on the Registration Card. The appellant testified further that the installment payment was RM400 plus per month, and that he made the final payment in May 1997.

[39] Based on the Registration Card No Siri 2267867 the Mazda car whose registration number was initially QSA 2365 appears to have been originally on 25 January 1988 registered under the name of one Yeu Sui Lang. Then on 22 May 1995 the appellant's name was endorsed on the said Registration Card, presumably after having entered into a Hire-Purchase Agreement. Ownership claim by PFB had been endorsed on the said Registration Card. Subsequently, that ownership claim endorsement had deleted, thereby indicating that the appellant had by then fully settled the hire purchase installments, and that ownership had since then passed to him. It would appear that on 23 May 2001 the registration number was changed to QSF 8285.

[40] During the inquiry before the learned Session Judge, it would appear the respondent did not challenge the appellant's testimony that "a final payment was made in May 1997." In fact; based on the formulation of the question in cross-examination (see p. 26 of the appeal record – "You informed the court you finished paying installment in 1997 ..."), the respondent seems to have taken it for granted that the appellant had "finished" paying for Mazda car in May 1997. Upon settlement of all the hire- purchase installments, the implication would logically and naturally be that ownership would then pass to the hirer, ie in this case the

appellant. And the ownership claim endorsement by Public Finance Berhad (PFB) on the relevant Registration Card was indeed deleted.

[41] Now, since the respondent appears to have conceded – in any case, implicitly – that ownership had passed to the appellant at any rate in 1997, and as the "Pengataan-pengataan Fakta Yang Atasnya Perintah Itu Diasaskan" states, *inter alia*, that the appellant was trafficking in dangerous drugs only since August 1999 to February 2000, and since early September 2001 until December 2002, then it would appear justified to conclude as having been on balance of probabilities satisfied by the appellant the burden of proof placed upon him to show that the Mazda car is not 'illegal property'. The appellant having done so, the burden then shifts to the respondent to prove clearly and conclusively that notwithstanding the afore-mentioned facts and circumstances, the Mazda car must still be considered as 'illegal property'.

[42] In the circumstances, it was insufficient for the respondent to have merely attempted raise doubts in the appellant's case by contending: (a)"... there was indeed no pressing necessity to obtain any financial loan from the finance company for the purchase of the vehicle", (b) "He did not ... adduce any evidence to show source of the deposit payment of RM35,000 (perhaps this was meant to be RM20,000) he paid nor any bank statement showing the inflow and outflow of this cash transaction from any bank account, and (c) "... it is preposterous that whilst one vehicle was purchased fully in cash due to the appellant's adamant refusal to pay the loan interest and term charges, another vehicle was purchased on a hire-purchase and made subject to interest and charges."

[43] To begin with there was no challenge by the respondent as to the ownership claim by Public Finance Berhad (PFB) having been endorsed on the Mazda car Registration Card. There was also no challenge as to the appellant's having presumably paid the final installment in May 1997, and neither was there any dispute as to the deletion presumably by the Road Transport Department of the said ownership endorsement by Public Finance Berhad. Such evidence lends credence to the appellant's evidence, that he had obtained a loan from Public Finance Berhad to part finance the purchase of the said car, and that such a loan was finally settled in May 1997.

[44] In other words, whilst "s. 32 places no burden on the Deputy Public Prosecutor to proof (summons in chambers) anything" (*Public Prosecutor v. Tan Lee Kok* [1998] 2 CLJ 286), with respect, at any point in time when a claimant to seized properties has established certain facts and/or circumstances on a *prima facie* basis, the Public Prosecutor should not be completely absolved from making a stand on any relevant and important fact and/or circumstances so established in an inquiry such as the instant case. And that such stand should be indicated during the proceeding including and particularly the cross-examination. Otherwise, the court would not derive much assistance in arriving at a just decision, and more importantly unfairness may arise.

The Nokia Handphone

[45] Concerning the Nokia T250 hand phone, the appellant testified in cross-examination he bought it in June 2003 presumably just prior to his arrest on 29 June 2003. He told the court he bought the phone for RM500 which "was from my salary". Concerning the cash RM1,220 the appellant testified it was "from his salary from Master Club." Learned counsel for the appellant submits: "As to the cash of RM1,220 and the Nokia Handphone ... The Forms J and the oral evidence ... are sufficient to rebut the same presumption of illegal property under s. 35 of the Act."

[46] The learned Deputy Public Prosecutor contends: "... in the absence of any documentary proof to show the contrary, the legal presumption of illegal property under s. 35 of the Act must apply in the instant claim ... this presumption is further enhanced by the appellant's arrest and detention for his association and involvement in the trafficking of dangerous drugs."

[47] The appellant's outline background history as disclosed by his testimony runs as follows. Having obtained formal education up to Form 1, he worked as a mechanic apprentice earning initially RM8 per month and gradually increased to RM150 per month. That was from 1979 to 1982. He testified that from 1982 to 1984 he worked in a photo studio, earning about RM250 per month. From 1984 to 1988 he testifies he operated "teksi sapu" earning about RM4,000 per month. He claims that since 1986 he was already a car dealer "on my own". For two months - presumably during the period between 1986 to 1988 – he says he

worked "with Tan Chong Motors" at a "fixed salary RM150 but I got commission form sales of cars." The appellant could not tell the court how much was his take home pay as he "never calculated how much commission (he) made." A

[48] The appellant testified he was "already dealing with cars (from 1988 to 1990) but only in 1993 I registered it as KK Motor Trading ..." According to him, KK Motor Trading ceased operation in 1996. Based on his evidence it seems he claims to have received the Form J for the 1998 year of assessment, "but I can't trace." It is to be noted that the Forms J exhibited marked "EXA 3 (A to E) (summons in chambers) would appear to be for the years of assessment 2003, 1998, 1999, 2000-2001 (two sets dated 1 October 2001 and 20 August 2002), and all are addressed to "KK Motor Trading Co". B C

[49] The respondent points out that based on the exhibited Forms J, the appellant's monthly earning was RM3,364.41, RM1,276.41, RM1,525.58, RM1,737.08 and RM1,731.75 for the years respectively 1998, 1999, 2000, 2001, 2002 and 2003. The respondent contends that the said Forms J are falsely declared. The learned Deputy Public Prosecutor supports the learned Sessions judge's finding that "the amount stated (in the Forms J) are in contradiction to the amount of earnings he testified in court" presumably thereby rendering as unreliable the appellant's testimony. The respondent submits "it would be wrong to accept that the appellant was earning such a nominal income in view of his contradicting oral evidence." Learned advocate for the appellant himself appears to have conceded that "in all probability (the appellant) might have under declared his income", but was quick to point out that "that was not the issue in the Lower Court". D E F G

[50] The appellant was arrested on 29 June 2003. The cash RM1,220 was found on him upon arrest, and according to the appellant the hand phone was bought recently prior to his arrest. Based on the appellant's testimony, since 1996 his night club ('Master Club' of which initially he was 100% shareholder until 2001 when he was holding only 50% share, and that 50% share was allegedly sold off in early June 2003) was earning "RM50,000 to RM60,000 per month". He testified he put such earnings "in (his) current account" but as at the day of giving evidence (29 July 2004) he no longer have the relevant documents "to H I

show the amount he kept". Assuming the truth of the appellant's evidence as to the probable amount of income he would have derived from the operation of the KK Motor Trading and the Master Club, such incomes – particularly those derived from the earnings of the Master Club – do not appear to have been reflected in the exhibited Form J declarations.

[51] The appellant testified he started selling drugs called "ecstasy" in 2001. Enclosure 1 entitled, "Pengataan-pengataan Fakta Yang Atasnya Perintah Itu Diasaskan", *inter alia*, states the appellant was trafficking in dangerous drugs since August 1999 to February 2000, and since early September 2001 until December 2002. Lack of documentary evidence to show his income from his alleged sources, particularly the night club 'Master Club', further clouded by the seemingly obvious non disclosure of such income in the Form J tendered in court and the high probability of his having through the said Forms J made false declarations, does make it tenable the submission that the appellant has failed to rebut on the balance of probabilities the presumption of liable persons under s. 35 of the Act. More specifically, the appellant has failed to prove to the contrary that the said cash and Nokia hand phone are illegal properties. The very poor quality if not false evidence adduced, juxtaposed with the appellant's own testimony of having been involved in selling dangerous drugs since 2001, makes it impossible to ascertain on balance of probabilities – the issue whether the said properties were wholly or partly derived or obtained from or by means of any prohibited activity of the appellant. (see s. 2(a) read together with ss. 32(3) of Dangerous Drugs (Forfeiture of Property) Act 1988.

For the afore-mentioned reasons, except for the order as regards the Mazda car, the appeal in respect of which is allowed and that the said order be reversed, the appellant's appeal concerning the rest of the properties is dismissed.